

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

MAURY DAVID MOORE,

Defendant and Appellant.

C065779

(Super. Ct. No. 08F03884)

Police officers conducted a protective sweep after they arrested defendant pursuant to a warrant and secured him in a police vehicle. During that sweep, they found a rifle. Defendant was charged with possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1))¹ plus allegations of a prior strike conviction (§§ 667, subds. (b)-(i); 1170.12) and service of three separate prior prison terms (§ 667.5, subd. (b)).

Following the denial of defendant's suppression motion (§ 1538.5), he pleaded no contest to the firearm possession charge and admitted the prior strike conviction in

¹ Hereafter references to undesignated sections are to the Penal Code.

exchange for the dismissal of the prior prison term allegation and an effective term of 16 months (eight-month midterm doubled because of the strike) to run consecutive to a 14-year sentence defendant was then serving.

On appeal, defendant contends (1) the trial court erred in denying his suppression motion, and (2) the evidence is insufficient to support the trial court's finding the rifle was in plain view during the protective sweep.

We conclude that the entry into his residence cannot be justified as a protective sweep and, therefore, his suppression motion should have been granted. Because the observation and seizure of the rifle were the products of the illegal search, we need not address defendant's contention regarding the rifle being in plain view.

FACTS FROM SUPPRESSION HEARING

On April 26, 2008, Sacramento City Officer Derick Cannedy responded to a domestic violence with injuries call at defendant's apartment. There, Cannedy was met by Giselle Moore, defendant's wife, whose face was swollen and cut and bloody. There was also blood on the floor. Giselle said defendant attacked her and then drove off in a white Ford Expedition. Giselle told Cannedy that she, her daughter, and defendant resided at the apartment.

On May 14, 2008, Officers John Gresham, Ben Spencer, and Johnny Lopez went to defendant's apartment to execute a felony arrest warrant for defendant based upon his attack on Giselle. At that time, Officer Gresham knew that defendant had prior convictions for manslaughter and felon in possession of a firearm, and that he drove a white Ford Expedition.

Officer Gresham knocked on the front door while other officers circled around the apartment. After "several minutes" Giselle answered the door and identified herself. Officer Gresham told Giselle he wanted to speak with defendant and asked if defendant could come to the front door. Giselle replied that "nobody was home" and "[s]he was the only one there." Officer Gresham knew this was not true because while Officer Gresham

was waiting for someone to answer the front door, Officer Spencer had told him that he had observed two people in a back bedroom of the apartment, one of whom looked like defendant.

Defendant eventually came to the door and was taken into custody outside the apartment within “[a]pproximately an arm’s reach” of the apartment door.

Officer Spencer testified he had taken up a position between a bush and a closed bedroom window and was able to see into the bedroom through the partially open slats in the vertical blinds. In the mirror on a closet door Officer Spencer could see the reflection of a person whom he thought was defendant, although he was not “one hundred percent” sure. The room was illuminated by the light of a flickering television. Because it was safer for the officers to have the person come out rather than the officers go in after him, Officer Spencer called out to the person that police officers were there and he should come out. The person did not respond, but lay on the bed and several minutes later the television was turned off. After the television was turned off, Officer Spencer could no longer see the person.

Officer Lopez was standing by to assist Officer Gresham in case the latter needed aid in arresting defendant. Officer Lopez heard defendant’s wife say defendant was not there and she repeated the statement when Officer Lopez attempted to enter the apartment. Officer Lopez also was told by Officer Spencer that he had seen an individual who matched defendant’s description, but that he “couldn’t tell whether it was or was not him.” Officer Lopez was aware that defendant had a felony warrant for domestic violence and had a felon in possession of a firearm “charge against him.”

After defendant was arrested and taken to a patrol car, Officer Lopez and other officers entered the apartment. Officer Lopez explained that based upon defendant’s wife having lied about his not being in the apartment, his having been violent with his wife, and his prior weapons convictions, the officers feared that there could have been someone

else hiding in the apartment who could have had access to a weapon to harm the officers who were still present and so they entered.

When the officers approached the bedroom in which Officer Spencer had seen someone, the entry door was “somewhat closed.” Officer Lopez “kind of opened” the door and “tried to look behind [it] to make sure nobody was back there.” The officers immediately entered and cleared the room. Because there was enough room behind the entry door to conceal someone, Officer Lopez opened the door and looked behind to make sure no one was there. That was when he saw a rifle in plain sight leaning against the wall.

TRIAL COURT’S RULING

In denying the motion the trial court stated: “Basically the facts in this case show that the officers appear there with an arrest warrant for [section] 273.5. They know the criminal history, or at least some of the criminal history of the defendant. [¶] They appear there, told that the person is not there. An officer sees someone in the bedroom who he thinks may be the person, and apparently the wife continues to say that he’s not there. And eventually he does appear and is arrested at the front door. [¶] I think the officers do have a right to do a protective sweep, especially of the room in which they saw persons in, which is my understanding is the same room as where the gun is found. [¶] On that basis I find there was a lawful search. The [section] 1538.5 [motion] will be denied.”

DISCUSSION

Relying on *Maryland v. Buie* (1990) 494 U.S. 325 [108 L.Ed.2d 276] (*Buie*) and *People v. Celis* (2004) 33 Cal.4th 667 (*Celis*), cases defining the scope and limit of a protective sweep search, defendant contends that because the discovery of the rifle was the product of an unconstitutional search of his apartment, his suppression motion should have been granted. We agree.

LAW RELATING TO PROTECTIVE SWEEPS

“When, as here, we review a ruling on a defense motion to suppress evidence, we defer to the trial court’s factual findings, but we independently apply the requisite legal standard to the facts presented. [Citation.]” (*Celis, supra*, 33 Cal.4th at p. 679.)

In *Buie*, the seminal case regarding a protective sweep, the defendant and another man, one of whom was wearing a red jogging suit, robbed a restaurant. Officers obtained an arrest warrant for the defendant and executed it at the defendant’s residence. Once inside, an officer shouted into the basement for everyone to come out. Defendant did so and was arrested. Another officer entered the basement in case someone else was down there, and saw in plain sight a red jogging suit which he seized. (*Buie, supra*, 494 U.S. at p. 328.) The Supreme Court upheld the seizure of the jogging suit, stating: “We conclude that the Fourth Amendment would permit the protective sweep undertaken here if the searching officer ‘possessed a reasonable belief based on “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted” the officer in believing,’ [citation], that the area swept harbored an individual posing a danger to the officer or others.” (*Id.* at p. 327.)

In *Celis*, the court expanded the protective sweep authorized by *Buie* to include a detention made outside the suspect’s home. “From the high court’s decision in *Buie, supra*, 494 U.S. 325, we draw these conclusions: A protective sweep of a house for officer safety as described in *Buie*, *does not* require probable cause to believe there is someone posing a danger to the officers in the area to be swept. (*Buie, supra*, at p. 327.) . . . A protective sweep can be justified merely by a *reasonable suspicion* that the area to be swept harbors a dangerous person. (*Buie, supra*, at p. 327.)” (*Celis, supra*, 33 Cal.4th at p. 678, original italics.)

The facts of *Celis* are instructive. There, law enforcement officers, including Detective John Strain, were investigating a drug operation whose members were concealing and transporting drugs in large truck tires. Defendant came under suspicion

and he and his residence were placed under surveillance. Defendant drove to a tire store where he obtained an air pressurizing tank. Later that day, he drove to the Mexican border, parked and walked across the border and the agents lost sight of him. The next day, accompanied by his wife, defendant drove around San Diego in an evasive manner. Later defendant returned to the same tire store where he obtained a deflated tire which was too big for his vehicle. Still that same day, defendant, accompanied by Luis Ordaz, returned to the tire store with an air pressurizing tank, remained a while, then returned to defendant's residence and took the tank inside. (*People v. Celis, supra*, 33 Cal.4th at pp. 671-672.)

About 40 minutes later, defendant emerged from his house rolling the previously deflated tire toward the alley. Ordaz drove into the alley in a pickup. Believing the tire contained either money or drugs, Detective Strain, along with other officers, detained defendant and Ordaz. Because Detective Strain was aware that defendant lived with his wife and “ ‘possibly a male juvenile,’ ” Detective Strain and other officers entered defendant's home “to determine if there was anyone inside who might endanger their safety.” No one was found, but inside a wooden box, large enough to conceal someone, they found packages of cocaine. (*Celis, supra*, 33 Cal.4th at pp. 672-673.)

Celis held these facts did not create a reasonable suspicion justifying the protective sweep. The court reasoned that because the agents had not kept track of who was in the house, they lacked knowledge that anyone else was in defendant's home. (*Celis, supra*, 33 Cal.4th at p. 679.) Further, neither the defendant nor Ordaz was armed at the time of the detention and no weapons had been found during earlier investigations of the trafficking ring. (*Id.* at p. 672.) Hence, under all of the circumstances, the agents had no grounds to reasonably suspect there were other persons present to threaten their safety. (*Id.* at pp. 679-680.)

Here, when the officers arrived at defendant's apartment they were aware that defendant, his wife Giselle, and a daughter lived in the apartment. They also knew

defendant had been convicted of manslaughter and felon in possession of a firearm, and that he had recently beaten his wife. Thus, at the time the officers approached defendant's residence they clearly had good reason to fear him, but no reason to fear either Giselle or the daughter. However, any basis for such fear totally dissipated after defendant was handcuffed and placed in a patrol car.

Thus the issue reduces to whether there were facts known to the officers which would give rise to a reasonable suspicion that another person was in the residence who posed a threat of harm to the officers. Those facts, the People argue, are as follows: Because Giselle lied to the officers about who was home, a "reasonable officer [would] . . . assume that she may be lying about the presence of other persons in the apartment." Although Officer Spencer had seen a person in the master bedroom whom he believed to be defendant, he could not know for certain that person was defendant because that person did not respond to Officer Spencer's calls for him to come out. The officers were aware of defendant's "violent history" and his being an "ex-felon in possession of a firearm" which presented the "possible presence of a person" and "possibility of a weapon in the home." Finally, because the officers were serving a warrant that "involved violence and severe injury, it was . . . reasonable for the officers to believe that any individuals located inside the apartment may also have posed a danger of violent reprisal." The argument is not persuasive.

At the time the officers went to defendant's apartment, they were aware that two adults lived therein -- defendant and his wife. While at the door of the apartment, Officer Gresham testified he was told by Officer Spencer that the latter had seen two people in the south bedroom, one of whom looked like defendant. Officer Spencer testified only to seeing one person in the south bedroom whom he believed was defendant, but he "couldn't make a hundred percent positive identification at that time." Officer Spencer did not testify to, nor did Officer Gresham claim to have heard, Officer Spencer state the second person was a male. Indeed, it is inconceivable that if Officer Spencer had seen

two males that the prosecutor would not have elicited such evidence because that would have settled the issue of the legality of the sweep in the prosecution's favor. Though not certain, Officer Spencer left no doubt that he believed the person he saw was defendant. We do not see, and the Attorney General has not shown, how the possibility, in-and-of-itself, that Officer Spencer could have misidentified defendant can give rise to a reasonable suspicion that he did so.

That Giselle lied about defendant being present when she was asked if he could come to the door shows little more than an attempt by a wife to keep her husband from being arrested, a not wholly unusual occurrence in domestic violence cases, but such lying without more says nothing about a dangerous third party being present.

As to there being a greater threat of a firearm being present due to defendant's prior conviction of felon in possession of a firearm, that threat is insufficient in the absence of a reasonable suspicion to believe that a third person was present to use the firearm. Certainly, defendant was not going to use it -- he was handcuffed in a patrol car.

Similarly, the Attorney General's claim that because the arrest warrant was for a violent offense it was "reasonable for the officers to believe that any individuals located inside the apartment may also have posed a danger of violent reprisal" again misses the point. Thus, the posited danger arises only upon the existence of a reasonable suspicion that there was another individual in the apartment, which defendant's dangerousness does not alone supply. And, even assuming there were sufficient facts to support a reasonable suspicion there was someone else inside of the premises, the officers articulated no facts that would support a belief the person was dangerous. (*People v. Werner* (2012) 207 Cal.App.4th 1195, 1206 [The *Buie* test requires a reasonable suspicion both that another person is in the premises *and* that the person is dangerous].) Indeed, Officer Lopez admitted he had no evidence that anybody who may have been in the house intended any "ill will" to the police." Consequently, the protective sweep was without legal justification and the suppression motion should have been granted.

DISPOSITION

The matter is remanded to the Sacramento County Superior Court with directions to vacate defendant's plea of no contest to a violation of Penal Code section 12021, subdivision (a)(1), and to grant defendant's Penal Code section 1538.5 motion to suppress the evidence relating to the rifle found during the search of his apartment. If the People are unable to proceed with the prosecution, the trial court is to dismiss the matter.

NICHOLSON, Acting P. J.

We concur:

BUTZ, J.

MURRAY, J.